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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 1505

MID-SOUTH TOWING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
A. The Board's Finding of Fact	3
B. The Decision of the Court of Appeals	8
C. Additional Relevant Facts	8
Reasons for granting the writ	9
I. The Board's Reinstatement Order Requires Petitioner to Return to Duty a Seaman Whose Nature and Disposition Will Render Unseaworthy Any Vessel on Which He Serves	9
II. The Board Has Condemned Petitioner's Efforts at Legitimate Self Help	11
Conclusion	13
Appendix A	A-1
Opinion of the Court of Appeals	A-1
Appendix B	A-5
Opinion and Order of the National Labor Relations Board	A-5
Appendix C	A-29
Relevant Portions of National Labor Relations Act and Jones Act	A-29

CITATIONS

Cases

Boudoin v. Lykes Bros. Steamship Company, 348 U.S. 336 (1955) 10

Clevinger v. Star Fish & Oyster Company, 324 F.2d 397 (5th Cir., 1963) 10

Heintz, H. J. Co. v. NLRB, 311 U.S. 514 (1941) 11, 12

International Association of Machinists v. NLRB, 311 U.S. 72 (1940) 12

Keen v. Overseas Tankship Corporation, 194 F.2d 515 (2nd Cir., 1952) 9, 10

Local 636, United Association of Journeymen and Apprentices, Plumbing, and Pipe Fittings Industry v. NLRB, 287 F.2d 354 (DC Cir., 1961) 12, 13

Mon River Towing, Inc. v. NLRB, 421 F.2d 1 (3rd Cir., 1969) 12

NLRB v. Delaware-New Jersey Ferry Company, 128 F.2d 130 (3rd Cir., 1942) 13

NLRB v. Link Belt Co., 311 U.S. 584 (1941) 11

Seas Shipping Company v. Sieracki, 328 U.S. 85 (1946) 9

Southern Steamship Company v. NLRB, 316 U.S. 31 (1942) 9, 10

Statutes

Jones Act (38 Stat. 1185, 41 Stat. 1007, 46 U.S.C., § 688) 3, 10

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.) 3, 10

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MID-SOUTH TOWING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

The Petitioner, Mid-South Towing Company, prays that a Writ of Certiorari issue to review a decision of the United States Court of Appeals for the Eighth Circuit entered in this case on January 13, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, Infra, pp. A-1–A-4. The findings of fact and conclusions of law and order of the National

Labor Relations Board, hereafter known as the Board, are reported at 177 NLRB No. 123, and appears at Appendix B, Infra, pp. A-5–A-28.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on January 13, 1971. This Petition for Certiorari was filed less than ninety days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner discharged a deckhand for the assigned cause that he had threatened a second mate with serious bodily harm while on board a towboat underway on navigable waters. The Board found the cause pretextual and ordered reinstatement with backpay notwithstanding the seaman's admission of the threat. The Board gave no consideration to the fact that Petitioner would be liable for any assault committed by the seaman because of its warranty that the vessels are seaworthy. The Board also found that petitioner violated other Sections of the National Labor Relations Act, as amended, despite the defense that one union, the Marine Officers Association, had secured the services of a boat Captain to aid in its organizational campaign. The questions thereby arising are:

(1) Whether or not the National Labor Relations Board may order the reinstatement of a seaman whose presence on board a towboat will render that vessel unseaworthy?

(2) Whether or not an employer may resort to self help to negate or offset the effect of union organizing efforts carried on with the aid and assistance of said employers supervisory personnel?

STATUTES INVOLVED

This case involves §§ 7 and 8 of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*; and the Jones Act, 38 Stat. 1185, 41 Stat. 1007, 46 U.S.C. § 688. These are reprinted in pertinent part in Appendix C, Infra, pp. A-29–A-31.

STATEMENT

A. The Board's Finding of Fact.

The Board found that the Petitioner interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act, and that it suspended and ultimately discharged employee Alvin Mansfield for discriminatory reasons, in violation of Sections 8(a)(1) and (3) of the Act (A. 20-45).*

The Petitioner is a river barge line engaged in the transportation of coal down on the Ohio and Mississippi Rivers to a point below New Orleans. The coal is transported in river barges which are wired together and pushed downstream by a towboat or motor vessel. The crew of the motor vessel consists of a captain or master, a pilot who is the second in command, mates, deckhands, cooks and engineers (A. 118).

Pursuant to a 1960 Board certification, the non-supervisory personnel on Petitioner's vessels have been represented by the Rivermen's Association of America, with the last collective bargaining agreement effective from April 1, 1966 to April 1, 1968. The union began an organizing campaign among Petitioner's employees in June or

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* "A." designates the page of the Appendix submitted to the Court of Appeals below.

July of 1967. On January 2, 1968, the Marine Officers Association, Local 54, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereafter referred to as the MOA, filed a Representation Petition with the Board which resulted in the Regional Director ordering and conducting a hearing, and subsequently the issuance of a Decision and Direction of Election on March 15, 1968 (A. 23).

The Board found the Captain of the Motor Vessel Martha Lynn, Harry Lewis, gave an unlawful, but "friendly warning" to deckhand Alvin Mansfield that the company had advised him to discharge Mansfield because of his attempts to organize on behalf of the MOA (A. 23-24).

Deckhand Oreskovich was told by Assistant Port Engineer Snyder that: the latter knew Oreskovich and Mansfield were trying to get union authorization cards signed for the MOA; Oreskovich was endangering his job and getting into bad standing with the company; and Oreskovich could transfer to another vessel if he felt that his superiors were pressuring him to join the MOA. Oreskovich declined the offer to transfer and asked to speak with the Port Captain, Ross, who supervised all the Petitioner's vessels (A. 24-25).

Pursuant to Oreskovich's request, Ross gave Oreskovich an audience when he was on board the Martha Lynn to transact other business. Oreskovich asked Ross why he was in bad standing with the Petitioner and Ross said one of the crew members had accused him of threatening the loss of a job for a refusal to sign an MOA authorization card. The Board also found that Ross offered to trade the names of the employee who had accused Oreskovich, if he would tell which crew members had signed MOA cards (A. 26). It found that Oreskovich had refused to accept the offer and that Ross advised him that the company president had said that no union would ever organize Petitioner (A. 26-27).

The Board found that Engineer Snyder told Deckhand Mansfield to cease soliciting cards because he was in trouble with the Petitioner (A. 25).

The Board found that the President of Petitioner, Gordon, addressed the employees on January 28, 1968, and at that time, he made strong reference to the fact that the MOA and some of its officers had an unsavory record, he asserted no union would organize the company, that the MOA was only interested in power and money and not in the employees' welfare, and the only weapon the MOA had was to strike the company and should that occur, the company would continue to operate. It was found the President referred to the Florida right-to-work law, and said under the law, the company would not agree to a hiring hall and if the MOA struck over this issue it would continue to operate. It was found that Gordon advised the employees that they would have had a wage increase which had been negotiated with the Rivermen's Association but for the fact that "certain people" were holding up the increase. At the end of the speech, Gordon turned to Mansfield and asked him if anyone had been telling him any lies. The speech was determined to have violated Section 8(a)(1) of the Act because it linked the withheld wage increase to the MOA, and it implied the futility of organization (A. 28-30).

It was found on February 1, 1968, the company increased the employees' wages $1.00 per day (A. 30-31).

The Board found on February 3 or 4, the Port Engineer and his assistant, Snyder, as well as First Mate Floyd of the Motor Vessel Girlie Knight, went on board the Martha Lynn to distribute a petition for employees to sign, which stated they were withdrawing their support from the MOA. The Board found the employees had been told that everybody on board should sign so there would be no discrimination against anyone. Mansfield was told he would not be fired if he signed the petition. Oreskovich

was told much the same thing as Mansfield and thereafter, he signed the petition (A. 31-32).

The Board also found that the morning of February 7, 1968, Oreskovich telephoned Captain Ross and advised him Mansfield had asked him to attend an NLRB hearing on the union's Representation Petition and asked what he should do in this regard. It was found Ross told Oreskovich that if it were him, he would stay away (A. 27).

The Board found two days before the February 7 hearing, Mansfield experienced some pain in his back and thought that he might have appendicitis and accordingly requested to be taken ashore. The Captain on board the Martha Lynn at that time, Hightower, arranged for Mansfield to be taken ashore by Snyder. After searching for a doctor unsuccessfully in Cairo, Illinois, Snyder and Mansfield went to Paducah, Kentucky where he was examined by a physician who reported that Mansfield's blood count indicated that appendicitis might be involved. Port Captain Ross, who was present at the time of the examination, asked if Mansfield could be returned to work and the physician replied that he would prefer to put Mansfield in the hospital for observation. Mansfield then asked to go home to see his personal physician and, accordingly, he was released to his doctor who treated him for a prostate infection. Mansfield's physician advised Ross that he had prescribed medicine for the employee and told him to rest and return on the following day (A. 32-33).

The following day, Mansfield did not see a physician but attended the Board's representation hearing. Ross was present at the hearing, he observed Mansfield, and thereafter called the employee's physician to determine if he had kept the appointment. He was told that Mansfield had not come in that particular day, but had come in the following morning. At this second appointment with the doctor Mansfield's prescription was renewed as the physi-

cian thought it sufficient to clear his infection (A. 34-35).

Following this, Ross suspended Mansfield for one tour of duty (thirty days) for the reason that he feigned illness in order to leave his station and attend the hearing. While the Board did not credit Ross he nonetheless testified that in addition to the fact that Mansfield did not attend his doctor's appointment, he had been told of a conversation between Snyder and Oreskovich in which Oreskovich said that Mansfield had said he intended to leave the Martha Lynn in any way possible in order to attend the hearing, all at a time when Mansfield knew he was not eligible for relief from duty (A. 147).

The Board found prior to Mansfield's discharge he had a disagreement with Second Mate William Sweet over work to be done on the tow while the vessel was underway. Mansfield told the mate to leave him alone or the two men would have to fight, and during this conversation Mansfield threatened to "bend a cheater bar over Sweet's head" (A. 37-38). At the hearing, it was stipulated that Mansfield's conduct warranted discharge at the time of the threat (A. 95-96).

On February 15, Ross learned of this threat from Sweet in casual conversation, and thereafter sought permission from company officials to discharge Mansfield. Because the General Manager of the company was absent from the United States that permission was not secured for a period of time. Despite the delay, Mansfield was still suspended by the Petitioner and was not actively employed on board any vessel. When permission was granted, Mansfield was discharged for insubordination and threatening physical violence against a mate who ordered him to carry out his normal duties as a deckhand (A. 160-162).

The Board found that Mansfield's suspension and discharge was discriminatory by discrediting Ross's version of a conversation with Oreskovich and finding that Mans-

field was too ill to perform his duties as a deckhand notwithstanding his attendance at the Board hearing (A. 38-39). Insofar as the threat to bend a "cheater bar" over Sweet's head was concerned, the Board found the event has occurred six months to one year before the discharge, and there was a delay of more than a month between the time Ross learned of the threat and the time of discharge and, therefore, the assigned cause was pretextual (A. 39-40).

B. **The Decision of the Court of Appeals.**

The Court, in a *per curiam* decision, granted enforcement of the Board's order. The Court recited it found the Board's decisions and credibility resolutions supported by substantial evidence on the record as a whole, and the Trial Examiner did not unduly limit Petitioner's cross-examination of witnesses.

C. **Additional Relevant Facts.**

The organizing campaign of the MOA had the assistance and support of Petitioner's supervisory personnel. The uncontradicted record evidence was that Second Mate Sweet was solicited to sign a MOA card in his cabin by the Captain of the Martha Lynn, Lewis, and First Mate Maxfield (A. 137-138). The Board has determined that persons holding the rank of Captain are supervisors within the meaning of the Act (General Counsel's Exhibit 2—A. 174-175).

Oreskovich, a deckhand called as a witness by Counsel for the General Counsel, admitted that he had been approached by Captain Lewis and by First Mate Maxfield, who would speak to him concerning the MOA, and speak of the MOA in favorable terms (A. 113-114, 117).

Oreskovich admitted that when Captain Ross spoke to him about the MOA one of the questions Ross asked was

one concerning Captain Lewis' connection with the MOA (A. 112). Oreskovich also acknowledged that Captain Ross had advised him that if his supervisors were applying "pressure" he, Ross, would remove that pressure from Oreskovich by transferring him to another vessel if that was the employee's wish (A. 106).

The Board found that Captain Lewis was a "union sympathizer" and that he was on "friendly" terms with Mansfield. Nevertheless the Board found the Petitioner responsible for Lewis' remarks (A. 23-24).

REASONS FOR GRANTING THE WRIT

I. **The Board's Reinstatement Order Requires Petitioner to Return to Duty a Seaman Whose Nature and Disposition Will Render Unseaworthy Any Vessel on Which He Serves.**

The Petitioner, as a ship owner, warrants the seaworthiness of his vessels and ship's personnel. The seamen are warranted to be "equal in disposition and seamanship to the ordinary men in the calling." **Keen v. Overseas Tankship Corporation,** 194 F. 2d 515, 518 (2nd Cir., 1952). This obligation on the part of a ship owner is "peculiarly and exclusively" his and it cannot be delegated to any other party. **Seas Shipping Company v. Sieracki,** 328 U.S. 85, 100 (1946). The Board is not free to assume this obligation under the guise of enforcing the Act for that duty is not to be pursued "so single mindedly that it may wholly ignore other and equally important Congressional objectives." **Southern Steamship Company v. NLRB,** 316 U.S. 31, 47 (1942).

An inextricable part of the warranty of seaworthiness is the fitness of ship's personnel, which includes the seaman's disposition. If a seaman is ". . . of a wicked disposition, a propensity to evil conduct, a savage and vi-

cious nature," there is a breach of that warranty. **Boudoin v. Lykes Bros. Steamship Company,** 348 U.S. 336, 339 (1955); See also **Keen v. Overseas Tankship,** *supra*; and **Clevinger v. Star Fish & Oyster Company,** 325 F. 2d 397 (5th Cir., 1963). Here a seaman, by his own admission, threatened to "bend a cheater bar" over the head of his Second Mate at a time the latter was engaged in giving lawful orders. The conflict did not have any connection with the subsequent organizing campaign of the MOA. Mansfield was discharged for this threat and the Board found the assigned cause pretextual, and the real cause union activity, notwithstanding a stipulation at the hearing that the threat was serious enough to warrant discharge at the time it was made.

It is necessary to consider the Board's finding of an unfair labor practice discharge, in conjunction with Petitioner's obligations under the Jones Act. The latter creates an absolute obligation on the part of a ship owner not to employ seamen who constitute a hazard to their fellow crew members. The Board's requirement that Mansfield be reinstated is an order that Petitioner violate this statutory duty towards seamen because Mansfield has demonstrated his dangerous proclivities. The Board has not considered the impact of this legislative solicitude towards seamen upon its reinstatement order, nor has it determined whether or not that solicitude is equal, inferior or superior, to legislative concern for union organizing campaigns. This Court's decision in the matter of **Southern Steamship v. NLRB**, *supra*, makes clear the Board's obligation to take into account the two legislative provisions and to accommodate the National Labor Relations Act to the Jones Act, "without excessive emphasis upon its immediate task." Had it done so it would seem that the primacy accorded the life and health of a seaman by the Jones Act would outweigh what, at most, is a transitory and oblique effect upon a union organizing campaign. This

is particularly true where the finding of an unlawful discharge is predicated upon inference rather than established fact.

The present situation is one in which Petitioner cannot comply with the letter of the Board order and its obligation to supply seaworthy vessels for its seamen. Had the Board met its obligation of accommodating this conflict between two legislative provisions, the Petitioner would not now face the severe practical difficulty of providing for the physical safety and well being of its employees and reinstating Mansfield. Therefore, it is essential that this Court provide the maximum possible guidance to the Board and the Court of Appeals, and this case presents a sound vehicle for equating and accommodating the considerations that led to the promulgation of both Acts.

II. The Board Has Condemned Petitioner's Efforts at Legitimate Self Help.

This case presents the novel issue of whether or not an employer may undertake acts, which would otherwise be unfair labor practices, in order to prevent supervisors from organizing rank and file employees. Just as the Board ignored the expressed Congressional intent to assure seaworthy merchant vessels, the Board has ignored Congressional intent to exclude supervisors from the union affairs of the employees.

It is well established hornbook law that an employer unlawfully interferes with union organizational efforts when supervisors participate in the solicitation of union membership among employees. **NLRB v. Link Belt Co.**, 311 U.S. 584 (1941); and **H. J. Heintz Co. v. NLRB**, 311 U.S. 514 (1941). The employer is legally responsible for the acts of his supervisors even though said acts were not authorized or otherwise attributable to him on application

of the doctrine of respondeat superior. **International Association of Machinists v. NLRB**, 311 U.S. 72, 80 (1940); and **H. J. Heintz v. NLRB**, *supra*.

Towboat captains, such as Lewis, were found to be supervisors within the meaning of the Act (A. 174-175). The Board has not hesitated to condemn the participation of towboat captains in union affairs such as collective bargaining. **Mon River Towing, Inc. v. NLRB**, 421 F. 2d 1 (3rd Cir., 1969). Here, however, the union activities of Captain Lewis not deemed noteworthy by the Board were:

1. Lewis' participation in the solicitation of an MOA card from Second Mate Sweet.

2. Lewis' comments to employees favoring organization by the MOA.

3. Lewis' special friendship with another MOA organizer and deckhand, Mansfield.

In addition, the Board completely ignored the history of the MOA which, until recently, had been an organization devoted exclusively to the representation of "supervisors" (A. 184).

In this context, it is vital to take cognizance of the fact that nothing in the Act makes it an unfair labor practice for a **union** to secure the services of a supervisor in its organizational efforts—even though the influence of the supervisor is no less pervasive than in a factual setting wherein the employer is merely an innocent bystander but who is found to have committed an unfair labor practice and who must disestablish his supervisors' control of the union. **Local 636, United Association of Journeymen and Apprentices, Plumbing and Pipe Fittings Industry v. NLRB**, 287 F. 2d 354 (DC Cir., 1961). Indeed, the union itself may be the prime mover in placing supervisors in high positions or union authority but the employer is

nevertheless held responsible for the unlawful participation of his supervisors. **Local 636 v. NLRB**, *supra*.

Compounding this problem is the influence of a ship captain, to whom:

> "the duty of obedience owed by a deckhand to obey the orders of a licensed ship's officer is greater than that of a worker at a bench in a factory to obey the direction of his foreman. If the latter refused obedience he would be insubordinate, but if the sailor refused obedience he would be mutinous if his act occurred upon waters within the admiralty jurisdiction of the United States." **NLRB v. Delaware-New Jersey Ferry Company**, 128 F. 2d 130, 137 (3rd Cir., 1942).

Petitioner's actions were clearly designed to offset the effect of supervisory influence upon the rank-and-file. Unquestionably that influence would have been condemned had it been the subject of an unfair labor practice charge against Petitioner. The absence of such a charge does not sanctify Lewis' conduct and it continues to be an affront to employees' Congressionally established right to refrain from union activities. Again the Board has failed to consider this objectionable supervisory influence as it applies to the unfair labor practices charged merely because that influence patently existed for the benefit of the MOA. This omission overlooks clear Congressional intent to accord employees the fullest means of self-determination.

CONCLUSION

The question as to whether or not reinstatement is a proper remedy when it would require the return of a belligerent and dangerous employee to a vessel sailing upon navigable waters, and the question of employer self-help when a union attempts to organize the employees through supervisory influence, have the common denomi-

nator of being issues the Board has ignored, rather than considered. These questions are not trifles to be ignored, rather they are issues the Board has the responsibility for resolving in the first instance. The Board has forgotten that obligation and to prevent this disregard for Congressional intent, Certiorari should be granted.

Respectfully submitted

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 20,163

Mid-South Towing Company,
Petitioner,
v.
National Labor Relations Board,
Respondent.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

APPENDIX

(January 12, 1971.)

Before Gibson and Bright, Circuit Judges, and McManus,[1] Chief District Judge.

Per Curiam.

Petitioner employer Mid-South Towing Company requests this court to set aside an order of the National Labor Relations Board which determined that it had committed unfair labor practices in violation of §§ 8(a)(1) and 8(a)(3) of the National Labor Relations Act during a campaign by the Union[2] to organize petitioner's em-

[1] Marine Officers Association, Local 54, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 20,165

Mid-South Towing Company,
Petitioner,
v.
National Labor Relations Board,
Respondent.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

[January 13, 1971.]

Before Gibson and Bright, Circuit Judges, and McManus, Chief District Judge.

Per Curiam.

Petitioner-employer Mid-South Towing Company requests this court to set aside an order of the National Labor Relations Board which determined that it had committed unfair labor practices in violation of §§ 8(a)(1) and 8(a)(3) of the National Labor Relations Act during a campaign by the Union[1] to organize petitioner's em-

[1] Marine Officers Association, Local 54, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America.

ployees. The Board cross-applies for enforcement of its order which is reported at 177 N.L.R.B. No. 123, 71 L.R.R.M. 1603 (1969). Petitioner engages in the interstate transportation of freight by boat on the Mississippi and Ohio Rivers. Our jurisdiction arises under §§ 10(e) and (f) of the Act.

In its decision, the Board determined that the employer's conduct interfered with, restrained and coerced its employees in exercising their rights of self-organization guaranteed by § 7 of the Act. The Board found the following facts as violative of § 8(a)(1) of the Act.

(1) Tugboat captain Harry Lewis warned deckhand Alvin Mansfield of possible discharge if the latter continued union organizational activity.

(2) Assistant port engineer John Snyder, whom the Board found to be a company supervisory employee, warned deckhands Peter Oreskovich and Mansfield that continued solicitation of union pledge cards endangered the latters' jobs.

(3) Port captain Andy Ross interrogated employee Oreskovich concerning his union organizational activity and sought to learn from him the names of crew members who had already signed union pledge cards.

(4) Petitioner's president, Captain Noble Gordon, in speaking to the crew of the tugboat Martha Lynn, inferred that the employer would never agree to recognize the Union and indicated that the company would have granted wage increases if there had not been employee activity on behalf of the Teamsters Union.

(5) Petitioner granted employees a dollar-a-day wage increase four days after its president had spoken to the crew of the Martha Lynn and a month after the Union

filed a representation petition. The Board found that the employer granted this wage increase to discourage support for the Union.

(6) Petitioner's supervisors solicited union activists Mansfield and Oreskovich to withdraw from the Union upon assurances of job security.

The record also disclosed that on February 14, 1968, the employer suspended employee Mansfield for thirty days for "feigning an illness which caused the Company a great deal of expense and inconvenience . . .." Mansfield was fired on April 9, 1968, for having threatened violence against one of the mates several months prior to either the suspension or the discharge. The Board determined that the suspension and discharge were motivated by the employer's anti-union bias. The Board dismissed petitioner's reasons for such disciplinary action as pretextual. Thus, the Board concluded that petitioner's conduct toward employee Mansfield violated §§ 8(a)(3) and (1) of the Act.

The petitioner now challenges the Board's findings of fact. We have carefully reviewed the record as a whole. We deem a lengthy recitation of evidentiary details to be unnecessary. The employer disputed the general counsel's contentions and introduced testimony which conflicted with evidence produced by the general counsel. Credibility and probative value, of course, are matters primarily for the trial examiner. After reviewing the record and considering the credibility determinations made by the trial examiner, we find adequate and substantial evidence in the record as a whole to support the conclusions reached by the Board.

The petitioner also charges that the trial examiner unfairly limited its cross-examination of witnesses, displayed

bias in favor of employee-witnesses for the general counsel and prejudged the case. We disagree. The trial examiner appears to have acted fairly and impartially toward both sides in the conduct of the hearing; he did not unduly limit petitioner's cross-examination of witnesses.

Accordingly, upon this record, the Board's findings of fact are conclusive. 29 U.S.C., §§ 160(e) and (f); **Universal Camera Corp. v. N.L.R.B.**, 340 U.S. 474 (1951).

We grant enforcement of the Board's order.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

Decision and Order

(Filed July 25, 1969)

On April 16, 1969, Trial Examiner Melvin Pollach issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in the case,[1] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

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[1] After the issuance of the Trial Examiner's Decision, the Respondent filed, on June 23, 1969, a supplement to its Brief in support of exceptions and a motion to reopen the record. Thereafter, the General Counsel filed an opposition to the Respondent's motion. The motion is hereby denied on the ground that sufficient reason has not been shown why the proffered evidence was not submitted at the hearing before the Trial Examiner. **Schott Metal Products Company**, 128 NLRB 415.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Mid-South Towing Company, its officers, agents successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C. July 25, 1969.

Frank W. McCullouch, Chairman
Gerald A. Brown, Member
Sam Zagoria, Member
National Labor Relations Board

(Seal)

Trial Examiner's Decision

(Filed April 16, 1969)

Cassius B. Gravitt, Jr., Esq., Cincinnati, Ohio for the General Counsel.

Alvin R. Mansfield, pro se., Thomas M. Hanna, Esq., and V. Lee McMahon, Esq. (McMahon & Berger), St. Louis, Missouri, for Respondent.[1]

Statement of the Case

MELVIN POLLACK, Trial Examiner: This case was heard at Paducah, Kentucky, on January 21 and 22, 1969, pursuant to a charge filed on June 7, 1968, and a complaint issued on November 4, 1968. The complaint, which was amended at the hearing, alleges that Respondent inter-

[1] An appearance was entered for Mr. McMahon, who was unable to attend the hearing because of transportation delays and illness.

fered with, restrained, and coerced employees, in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, and that Respondent discriminatorily suspended and discharged Alvin R. Mansfield, in violation of Section 8(a)(3) of the Act.

Upon the entire record in the case,[2] my consideration of briefs filed by the General Counsel and Respondent, and my observation of the witnesses, I make the following:

Findings and Conclusions

I. The Business of Respondent

Mid-South Towing Company, herein called Respondent or the Company, is engaged in the interstate freight transportation of goods by boat on the Mississippi and Ohio rivers. Its gross revenues during the 12 months preceding the issuance of the complaint exceeded $50,000. I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2 (2), (6) and (7) of the Act.

II. The Labor Organization Involved

The Union, Marine Officers Association, Local 54, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.[3]

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[2] Respondent's motion to correct the record is granted.

[3] President Charles L. Jones testified that the Union has approximately 600 members and that of this number 425 are supervisory employees and 175 are non-supervisory employees. The Union's current constitution and bylaws do not restrict membership to supervisory employees. It is clear from the record in this proceeding that the Union was seeking to organize persons who are "employees" within the meaning of Section 2(3) of the Act. I find that the Union is a labor organization under Section 2(5) of the Act. **Graham Transportation Company**, 124 NLRB 960.

III. The Unfair Labor Practices

A. **Interference, Restraint, and Coercion**[4]

1. The Union's organizing campaign

Respondent at all material times operated motor vessels **Martha Lynn, Julia Woods,** and **Girlie Knight.** Its non-supervisory personnel on these vessels, including deckhands, oilers, cooks, and cook helpers, were represented by the Rivermen's Association of America pursuant to a Board certification issued in 1960 and a current collective bargaining agreement, effective April 1, 1966, to April 1, 1968. The Union in June or July 1967 began an organizing campaign among these employees, and, on January 2, 1968, filed a representation petition with the Board's Cincinnati office. A hearing was held on this petition at Paducah, Kentucky, on February 7, and on March 15 the Board's regional director issued a decision and direction of election.

2. Supervisory Statements

(a) **Captain Harry Lewis**

Deckhand Alvin Mansfield solicited fellow crew members on the **Martha Lynn** to sign union cards. About December 10, 1967, Captain Harry Lewis told Mansfield that he had been called to the Company's office and advised to get rid of "undesirable personnel" and Mansfield for organizing in behalf of the Union. The record

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[4] I find no merit in the Company's contention that the Section 8(a)(1) allegations in the complaint are not based upon an adequate charge because the charge alleged a violation of Section 8(a)(1) without particulars. The complaint spelled out the alleged violations of Section 8(a)(1) and the Company had adequate time to prepare its defense. **Texas Industries, Inc. v. N. L. R. B.,** 336 F. 2d 128 (C. A. 5).

indicates that Captain Lewis was a union sympathizer and that his remarks were intended as a friendly warning to Mansfield. Nevertheless, his remarks conveyed a clear threat that Mansfield risked discharge if he continued his union activity and therefore were violative of Section 8(a)(1) of the Act.[5]

(b) **Assistant Port Engineer John Snyder**[6]

Deckhand Peter Oreskovich, who had solicited employees on the **Martha Lynn** to sign Union cards, testified that about December 20, 1967, Assistant Port Engineer Snyder asked him in the chief engineer's room on the **Martha Lynn** what he and Mansfield were trying to do, that he had heard they were "trying to get pledge cards for the [Union]." He said Oreskovich was "endangering" his job and "getting into bad standing with the Company." He offered to transfer Oreskovich to the **Girlie Knight** if Oreskovich "felt like [he] was under any pressure at all from any of the supervisors over [him] on the boat." Mansfield said he was "satisfied" on the **Martha Lynn** but that he wanted to talk to Port Captain

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[5] The Company contends that Captain Noble Gordon, its president, had instructed Lewis to caution Mansfield that he would be discharged if he persisted in telling employees that they would be discharged if they failed to sign union cards before the Union successfully organized the Company. It does not appear that Lewis advised Mansfield of any such instruction.

[6] The record shows that Snyder is the assistant port engineer of Southern Marine Management Company, which supervises the Company's captains and crews. Snyder testified that he furnished supervision for the Company's engineers, that he boards the Company's vessels to direct the repair and refitting of engines, which would otherwise have to be repaired at a marine yard. Raymond Boren, assistant engineer on the **Martha Lynn**, testified that Snyder provides "expert assistance in the operation of the boat" and that while the chief engineer is his "boss" on the boat, anytime Snyder comes on board, "he's more or less senior officer and I do what he tells me." I find from these facts that Snyder is a supervisory employee within the meaning of Section 2(11) of the Act.

Andy M. [Sid] Ross since he "didn't know that [he] was in such bad standing with the Company."

Snyder testified that he asked Oreskovich "why he was trying to run the engine room crew off the boat." Oreskovich denied doing so and wanted to know who had said he had. He was "crying" and said "he felt he had to do what . . . his supervisors wanted him to do." Snyder offered to transfer him but Oreskovich said he was happy on the **Martha Lynn** but wanted to talk to Captain Ross "at the first opportunity." Snyder denied telling Oreskovich that his job was in danger because he was supporting the Union.

Mansfield testified that in January 1968 Snyder remarked to him that he had heard that Mansfield "had been trying to get pledge cards signed for the [Union] and that [he] had better stop because [he] was skating on pretty thin ice with the Company." Snyder testified that he told Mansfield only that "he should not be telling people they were going to lose their jobs if they did not . . . join the Teamsters."

The Company asserted that its officials were concerned with reports that Oreskovich and Mansfield had threatened fellow crew members with discharge and that Snyder simply warned them to stop such conduct. The testimony of Oreskovich and Mansfield gains support, however, from my findings below that Respondent engaged in a course of coercive conduct, including a wage increase, solicitation of employees to withdraw from the Union, and the suspension and discharge of Mansfield for his union activities. For this reason, and as Oreskovich and Mansfield impressed me as reliable witnesses, I credit their testimony and find that Snyder unlawfully threatened them with discharge if they did not stop their organizing activity in behalf of the Union.

(c) Port Captain Andy M. Ross

Captain Ross came on board the **Martha Lynn** sometime in January and sent word to Oreskovich that he wanted to see him in the "guest room." Oreskovich testified that he told Ross that he had heard he was in bad standing with the Company and in danger of losing his job. Ross said somebody had signed a statement to the effect that Oreskovich had said he would lose his job if he "didn't sign a pledge card." Oreskovich denied doing so and asked Ross who had given the statement. Ross offered to give him the name if Oreskovich would tell him which crew members on the **Martha Lynn** had signed union pledge cards. Oreskovich would not do so and when asked by Ross about Mansfield and Charles Edwards, said he knew nothing about them. He kept quiet when Ross asked him about Captain Lewis. Ross remarked that President Gordon had told him that no union was going to organize the Company ever and that the Union "had just been feeding us a pack of lies and they couldn't benefit us at all."

According to Ross, Oreskovich said he had "been talked into signing a pledge card with the Teamsters Union" and was afraid he might lose his job. Ross asked him if either Captain Lewis or Captain Hightower had "pressured" him into signing a card. Oreskovich said he would "rather not call any names." Ross enumerated the advantages of working for the Company and said he could not understand what the Union could "possibly ask for if they come in here." Oreskovich said he liked his job and did not want to lose it. Ross assured him "from all reports you are a good deck hand. . . . So, you just do your job and you'll have no problems with this company."

I find, as Oreskovich testified, that Ross asked him to identify the crew members on the **Martha Lynn** who had

signed union cards. Such interrogation in the context of the other unfair labor practices found herein is violative of Section 8(a)(1) of the Act. I also find the remarks attributed by Ross to President Gordon violative of Section 8(a)(1) of the Act as they implied that it would be futile for the employees to join the Union because Respondent would never agree to recognize it as the representative of its employees. **Better Val-U Stores of Mansfield, Inc.**, 161 NLRB 762, 763.

In the morning of February 7, 1968, Oreskovich telephoned Captain Ross and told him that Mansfield had asked him to go to the Board hearing at Paducah on the Union's representation petition. According to Oreskovich, Ross answered that "it would be best that [he] didn't go." Ross testified that he reminded Oreskovich of their previous conversation in which Oreskovich said he did not want to have anything more to do with the Union and then said to him "if it were me I'd stay away from [the hearing]." Ross' advice to Oreskovich implied that it would not be safe for him to show interest in the Union and hence was violative of Section 8(a)(1) of the Act.

3. Captain Noble Gordon's Speech

On January 28, 1968, Captain Gordon, Respondent's president, spoke to the **Martha Lynn's** crew in the lounge of the vessel.[7] According to Mansfield, Gordon said the Union was "nothing but a bunch of thugs and convicts and scum of the earth," and that [pointing his finger at Mansfield] the Union and anyone associated with it were "liars," and that "there was not going to be a union organized in his company." He declared that the Union was good for nothing but "to get you into trouble." Gordon remarked that Respondent had increased

[7] In addition to the 14 persons in the crew, Vice President Kirkpatrick and Port Captain Ross were present during Noble's remarks.

the employees' retirement and insurance benefits and that the employees "would already have had an increase in salary if it had not been for certain people holding it up." Gordon asked if the employees had any questions. After some questions had been asked about Respondent's insurance plans, Gordon asked Mansfield, "How about you, Mansfield, has anyone been telling you any lies?" Mansfield replied that he "didn't know who was doing the lying," but finally answered "No" when Gordon pressed the question whether Mansfield thought he was lying. Gordon then asked Mansfield if anyone had "approached" him and Mansfield said "No."

Oreskovich testified that Gordon prefaced his antiunion remarks with a description of "how good we had it and how good the boats were, good food, the best wages on the river." Gordon referred to the Union as thugs, convicts, liars, scum, spoke about "Hoffa being in the penitentiary and still drawing his salary," and said "there wasn't any union going to organize his company." Gordon referred to the "increase in our insurance and pension plan" and said the employees would have had a raise if "certain people" were not holding up Respondent's negotiations with the Rivermen's Association." Gordon then directed "a couple of questions" at Mansfield, asking him "if he thought he was lying to him, had anybody been telling him any lies." Gordon said the employees would be raised a dollar a day and that "there was going to be better company-employee relationships" than there had been in the past.

Captain Gordon testified: He told the employees Respondent had been dealing under contract with a certified union "for a good many years" but that the Teamsters, whose president was in jail, "had a long record of thievery and all kinds of sculduddery." He said the men had the right to join the Teamsters but "there were some in there he would call the scum of the earth" and that he

would not at any time let the Teamsters "take an unfair advantage . . . by threats and intimidation, which is their stock in trade." He said the men could vote in an election "as it suited them"; that they were "not to be fearful of threats and intimidations by anyone"; and that he would bring "to a screeching halt" attempts which he knew had been made "to coerce and intimidate men aboard this vessel." He "went into some detail about the benefits that this company had provided." He said he would bargain in good faith with whatever union the men voted to represent them but that the Teamsters' "only weapon . . . was to strike the company" and that the company would fulfill its obligations to customers "and that means running the boats." He said the Company would never agree to "a union shop, as it's sometimes known, a hiring hall . . . where the men actually buy their jobs from whoever is running the hiring hall." He described the Florida right-to-work law "in some detail," said he would make sure the employees had all the facts, and emphasized that "the usual pattern is that you will receive nothing but lies from the scum of the earth." He described Respondent's pension, hospitalization, and life insurance programs. He denied telling the employees that "somebody" was holding up a wage increase, that "no union was going to organize" the Company, or that a union could do nothing for the employees but get them in trouble." He said he had asked Mansfield "if anyone had ever lied to him."

I credit the testimony of Mansfield and Oreskovich to the effect that Captain Gordon said the employees would have had a wage increase but for the Union. As this statement linked the withholding of wage benefits to the Union's organizing efforts, it was violative of Section 8(a)(1) of the Act.

I do not accept Mansfield's testimony that Gordon expressly said the Union could only get the employees

in "trouble." As this testimony was not corroborated by Oreskovich, I believe that Mansfield's testimony in this respect reflected his impression of Gordon's remarks rather than what Gordon actually said.

Documentary evidence introduced by the Company indicates that it advised the employees prior to the advent of the Union of improved insurance and retirement benefits and the institution of a pension plan. I therefore find no merit in the General Counsel's contention that Gordon's references to these matters constituted unlawful promises of benefits.

Gordon, Mansfield, and Oreskovich are in substantial agreement that Gordon referred to the Union as made up of thugs, convicts, scum, and liars, and I credit the testimony of Mansfield and Oreskovich that Gordon joined to those epithets a statement that no union was going to organize the Company. Gordon's own testimony shows that he emphasized the dangers of a strike if the employees selected the Union as their bargaining representative. I find Gordon's speech viewed in its entirety violative of Section 8(a)(1) of the Act as it was calculated to impress upon the employees that it would be futile for the employees to support the Union because Respondent would never agree to recognize it.

I find further that Gordon singled Mansfield out for special attention and that, in the context of his antiunion remarks, his asking Mansfield whether "anyone" had lied to him or had "approached" him constituted coercive questioning of Mansfield concerning union activities violative of Section 8(a)(1) of the Act.

4. The Wage Increase

The Union on January 2, 1968, filed a timely representation petition which was pending before the Board when Respondent on February 1 gave the employees a dollar

a day wage increase allegedly negotiated with the Rivermen's Association. Respondent introduced no evidence concerning the negotiations. I find that the wage increase was given at a time and in a manner intended to discourage support of the Union and hence that it was violative of Section 8(a)(1) of the Act.

5. Solicitation of Employees to Withdraw from the Union

On February 3 or 4, 1968, Port Engineer Charles Collins, Assistant Port Engineer John Snyder, and first mate Jack Floyd of the **Girlie Knight** came aboard the **Martha Lynn** at Memphis, Tennessee. In the mates' room on the boat, Floyd showed Mansfield a paper reading, "I withdraw my support from the MOA," and asked him to sign it, saying "we want everybody on the boat to sign them so there won't be no discrimination against anybody." Floyd showed Mansfield copies signed by crew members on the **Girlie Knight**, the **Julia Woods**, and the **Martha Lynn**, and told him he would not be fired if he also signed the withdrawal slip but Mansfield refused to sign.

Snyder gave a withdrawal slip to Oreskovich, saying that President Gordon wanted all the employees to sign one so that "nobody would know who signed a pledge card and who didn't." He told Oreskovich that "if a man signed the paper he wouldn't have to worry about losing his job." Oreskovich signed the withdrawal slip.

Snyder's solicitation of Oreskovich to withdraw from the Union was violative of Section 8(a)(1) of the Act.[8]

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[8] I reject Snyder's testimony that he did not solicit Oreskovich to withdraw from the Union. He did not deny coming on board the **Martha Lynn** with Collins and Floyd, nor did he deny Oreskovich's testimony that he, Collins and Floyd gave out "little papers" to withdraw from the Union. Mansfield's testimony that Floyd asked him to sign a withdrawal slip is uncontradicted.

Whether or not Floyd is a suprevisor under the Act, he was associated with Snyder in soliciting employees to withdraw from the Union. His solicitation of Mansfield to withdraw from the Union is therefore attributable to the Company and also violative of Section 8(a)(1) of the Act. **Brown Specialty Company**, 174 NLRB No. 77.

B. **The Discrimination Against Mansfield**

On Monday morning, February 5, Mansfield told first mate Hubert Maxfield that he thought he had better get off the **Martha Lynn** because he had "a bad hurting in his side and back" and thought it might be appendicitis. Maxfield went off to see Captain Hightower,[9] and Mansfield went to his room where he asked Oreskovich, his roommate, to pack his clothes because his back was hurting "real bad." Oreskovich did so while Mansfield lay in bed. Maxfield came in and said Captain Hightower would see him "when he came down to dinner." Mansfield waited for Hightower for about 45 minutes and then went to the pilothouse. He told the pilot he had to get off because his back was hurting him and he was afraid it might be appendicitis. The pilot called Hightower, who came to the pilothouse and told Mansfield that the Company would have a doctor see him in Cairo. Mansfield said he did not think he should wait that long,[10] and said he would like to see a doctor at Hickman, about 35 to 40 miles below Cairo. Hightower said there was no one at Respondent's office in Paducah to pick him up and Mansfield said he would call his wife to "come down and pick me up." Hightower told Mansfield not to call his wife and said, "We'll get you a doctor." Assistant Port Engineer Snyder, who was on board, dressed and got off the boat with Mansfield at Hickman.

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[9] Captain Lewis was on his "off" days.

[10] The **Martha Lynn** was 5 to 8 hours away from Cairo.

In Hickman, Snyder telephoned someone in Paducah and told Mansfield he would take him to Cairo. Mansfield suggested they go to Paducah, about 15 miles above Cairo, but Snyder said, "no, we'll just go to Cairo." Snyder called a cab and the two men went to the hospital at Cairo. Snyder called the Company again because the doctor he had been instructed to have examine Mansfield was not in. Snyder was instructed to take Mansfield to Paducah. Snyder rented a cab to Wickliffe, Kentucky, across the river from Cairo, where the Company had sent a car to pick them up. Mansfield was taken to the Medical Arts Building in Paducah, where a Dr. Bradford examined him for an hour and a half. Port Captain Ross came to the office during the examination and asked Dr. Bradford what was wrong with Mansfield. Dr. Bradford said "Mansfield's blood count was 180, on the borderline of appendicitis," that, "you can't tell, it's right there where it could be either way." Ross said, "in other words, there is nothing wrong with him and we can put him back to work?" Dr. Bradford replied, "No, I'd like to put him in the hospital for observation for a couple of days."[11] Mansfield asked Dr. Bradford if it would be all right to go home that night and see his own doctor in the morning. Dr. Bradford said it would be all right "as long as you go to him in the morning."

Ross drove Mansfield and Snyder to the Southern Marine Management office where Snyder's car was parked. On the way "across town," Ross asked Mansfield if he had any comments to make on President Gordon's speech in New Orleans. Mansfield said he guessed he had "better not make any objections because he wouldn't like them." At the Southern Marine Management office Snyder

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[11] Ross testified that Dr. Bradford told him: "I can't find anything definitely wrong. He felt a little tender around the appendix, but I see nothing serious."

and Mansfield got into Snyder's car and Snyder drove Mansfield to his home in Burma, Kentucky, and carried Mansfield's bags in for him.[12]

The next day, February 6, Mansfield was examined by Dr. Stephen Burkhart, who told Mansfield he had a prostate gland infection and gave him a prescription. He told Mansfield to take the medicine and to come back the next morning or sometime the next day.[13]

The Board on February 7 conducted a hearing at Paducah on the representation petition filed by the Union. Mansfield attended but did not participate in the hearing, which ended at 3:50 p. m.[14]

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[12] Snyder testified that Mansfield "kind of chuckled" on the way home and said, "You fellows didn't think I had anything wrong with me, did you?" Snyder replied that if Mansfield said he was hurting as far as he was concerned he was hurting. Snyder further testified that the next day he brought a deckhand to the **Martha Lynn** to relieve Oreskovich. Snyder drove Oreskovich back to Paducah. On the way back, according to Snyder, Oreskovich told him that Mansfield knew he was expected to stay on the boat at the end of the trip because the Company had only one deckhand to relieve the two of them and that he said to Oreskovich before he got off the **Martha Lynn** on February 5 that "he was going to get off the boat here and attend the [Board] hearing" which he knew was scheduled to be held at Paducah on the morning of February 7. Snyder allegedly reported this conversation to Captain Ross. Ross testified that Snyder had advised him of this conversation with Oreskovich. Oreskovich denied having had any such conversation with Snyder.

[13] Ross testified he called Dr. Burkhart "around noon" on February 6 and asked him if he had examined Mansfield and "if he'd mind telling me what he found." Dr. Burkhart replied, "I found he was a little tender around his appendix and I also found he has a slight infected prostate."

[14] Mansfield testified he was "feeling some better" on February 7 but that he "still didn't feel like running around." He knew while on the **Martha Lynn** that the hearing was scheduled for 10 a. m. at Paducah on February 7.

Mansfield saw Dr. Burkhart the next morning and again on February 12.[15] Dr. Burkhart gave him refill prescriptions for the medicine he had been taking. He told Mansfield on February 12 that the last prescription should clear the infection up but to come back if it was still bothering him.[16]

By letter dated February 14, 1968, Port Captain Ross notified Mansfield that he was suspended for 30 days. The text of the letter is as follows:

> This is to advise you that you are hereby given a disciplinary suspension from your duties as an employee of Mid-South Towing Company for a period of thirty days commencing upon the expiration of your accrued leave time which expires March 9, 1968.
>
> The reason for this action is that on February 5, 1968, you misrepresented that you were seriously ill while on duty aboard the M/V MARTHA LYNN, and before your normal relief time, causing the Company great expense and inconvenience in arranging for relief for you, in removing you from the vessel, providing an escort and taxi cab services for you, and paying for physician's examination.

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[15] Captain Ross testified that Mansfield showed no "obvious signs" of illness at the Board hearing and that he called Dr. Burkhart on February 8 and asked him if Mansfield had kept his appointment the previous day. Dr. Burkhart said Mansfield had not come in on February 7 but that he had examined him "this morning." Ross asked, "How is he today?" and Dr. Burkhart replied, "Oh, he's much better. His appendix has completely cleared up. He still has a slight problem here with his prostate. He's taking his medication but it's healing. I see no problem."

[16] A note from Dr. Burkhart, received into evidence as General Counsel's Exhibit 4, recites that Dr. Burkhart saw Mansfield on February 6, 8, and 12, 1968, and that Mansfield "had an acute prostatitis." Mansfield testified that he was again treated by Dr. Burkhart about December 1968 for a prostate infection which was "not near as serious as it was the first time" and which cleared up in 4 or 5 days.

> We have learned that in spite of your protestation of serious illness, you did not even keep your appointment with your own doctor at Salem, Kentucky, on February 7, 1968, and in fact you were well enough to spend the entire day in Paducah, Kentucky, 20 miles away from your home and doctor, attending a hearing before the National Labor Relations Board.

About a week after receiving this letter, Mansfield called Captain Ross and asked him when he was going to put Mansfield "back on the boat." Ross replied that he would be put back on the boat when his suspension was up. Mansfield called Ross' office two or three times after this conversation but was told each time that Ross was out. Mansfield again called Ross on the day his suspension was up but was told that Ross was out of town. Mansfield drove to the office of Southern Marine Management and found Ross there. Ross called Mansfield into his office and told him, "We are not going to put you back on the boat. We are going to let you go." He added that Mansfield's letter of discharge was already in the mail. Mansfield said he "could have been looking for another job. *Instead of suspending me, if you* had just gone ahead and fired me that would have helped me a whole lot." Ross replied, "Well, you haven't done anything to help us."

Mansfield received the following letter of discharge, dated April 9, 1968, from General Manager Thomas A. Kirkpatrick:

> On February 14, 1968, you were notified of your being given a thirty-day disciplinary suspension for feigning an illness which caused the Company a great deal of expense and inconvenience in arranging a relief for you, in removing you from the vessel, providing escort and taxi cab services for you and paying for physician's examination.

> Since that time it has been reported to me that on another occasion you were insubordinate and threatened to use physical violence against one of the mates when you were ordered to carry out some of your normal duties as a deckhand. A thorough investigation of this charge has proved its truth.
>
> Our operations on the river are dangerous enough for our people without having them to worry about a crew member committing an act of physical violence against another. We have never countenanced such conduct on our vessels, nor will we in the future, and for this reason, we are at this time permanently discharging you as an employee of Mid-South Towing Company.

Mansfield testified that about a year before his discharge, second mate William Sweet instructed him about 3 p. m. to do some work on the tow at 4 p. m., but that he spliced wire until 4:20 p. m. without noticing that 4 o'clock "had gone by." Sweet came over to him and yelled at him for not going out to the tow. Mansfield walked to the tow but Sweet "came out there and he was still going on at him for not doing this." Mansfield said it was his fault for not noticing the time but Sweet "just kept on," so Mansfield told him "You either get off of me or you and me are fixing to mix it up right here." Sweet "hushed up" and, so far as Mansfield knew, "it was all settled down" and Sweet did not report the incident to anyone.[17] Mansfield said that he and Sweet both used "pretty tough" language in their argument and that he "threatened to bend a [cheater bar] over [Sweet's] head."[18] Sweet retorted that he would hit Mansfield first

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[17] Mansfield was transferred a day or two after this incident from the after watch to the forward watch supervised by the first mate on the vessel.

[18] A cheater bar is made of 2-inch pipe and is about 3½ feet long.

if he "didn't shut up." Mansfield worked with Sweet for "about a year" after this incident without further trouble.

Second mate Sweet testified that he had an argument with Mansfield in October 1967 and that he may have spoken "in a harsh way" to Mansfield, who, on the way out to the tow, said Sweet would have "to use a different tone of voice to him or he was going to hit me in the head with a toothpick."[19] Sweet refused to get in a fight with Mansfield because it would cost him his job. He reported the incident to first mate Maxfield but let the matter drop when nothing happened. He mentioned the incident, however, to Captains Ross and Hightower when they told him after the Board representation hearing on February 7, 1968, that Mansfield was not to be allowed on board the **Martha Lynn**. Sweet remarked that he "didn't care for [Mansfield] anyway" and he told them of Mansfield's threat when they asked him the reason why. Ross corroborated Sweet's testimony concerning his conversation with Ross and Hightower. He said this conversation occurred about February 15, that he told Mr. Zempel, a Company official, that he thought Mansfield should be discharged, but that Zempel suggested they wait for General Manager Kirkpatrick's return from Holland. Ross "filled [Kirkpatrick] in on the late developments" when Kirkpatrick returned to the country a week or two later. Kirkpatrick agreed that Mansfield should be discharged because "We have never allowed this kind of thing on our boats. We will not start now."

The record shows that Dr. Bradford examined Mansfield at Paducah and found that his blood count was "on the border of appendicitis." The next day and for about a week thereafter Dr. Burkhart treated Mansfield for a

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[19] Sweet described a "toothpick" as a 2-foot long car axle of solid steel about an inch around. He said Mansfield had nothing in his hands when he made the threat.

prostate gland infection. As I see no reason to question the competency of the two doctors, I find that Mansfield was ill when he asked to be taken to a doctor on February 5 and when he saw Dr. Burkhart the next day. The fact that Mansfield was well enough to attend the Board hearing on February 7 does not mean that he was well enough on February 5 to perform his duties as a deckhand.[20] Captain Ross' testimony shows that he was informed by Dr. Burkhart before and after the Board hearing that Mansfield was being treated for an infected prostate.

Snyder testified, and Oreskovich denied, that Oreskovich gave him to understand that Mansfield feigned illness to attend the hearing on February 7. Although Snyder allegedly informed Ross of such a conversation with Oreskovich, Ross said nothing about it in his letter suspending Mansfield, in his conversation with Mansfield about a week later concerning the date of Mansfield's return to work, or when he notified Mansfield of his discharge. I have previously noted that Oreskovich impressed me as a reliable witness. I reject the testimony of Snyder and Ross to the effect that Snyder learned from Oreskovich that Mansfield feigned illness on February 5 and that Snyder so informed Ross.

Mansfield's argument with Sweet occurred from 6 months to a year before Mansfield's discharge and was an isolated incident in their work relationship. Sweet told Ross on February 15, 1968, about Mansfield's threat to hit him with a steel bar. Although Ross testified that he immediately decided that Mansfield should be discharged,[21]

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[20] Mansfield testified that his work as a deckhand included carrying "hundred pound ratchets around."

[21] Ross made no effort to obtain Mansfield's version of the argument because "Sweet's verification was good enough for me." Sweet's written statement concerning the incident, introduced into evidence as Respondent's Exhibit 14, indicates a verbal exchange unaccompanied by any act of physical violence.

it appears from Mansfield's uncontradicted testimony that Ross told him about a week later that he would be put back to work after missing a regular tour of duty because of his suspension. According to Ross' own testimony, he did not even take up the question of Mansfield's discharge with another Company official, Zempel, until a week or two before Vice President Kirkpatrick returned from Europe in April 1968. Had Ross considered Mansfield's conduct as reported by Sweet of sufficient importance to warrant Mansfield's discharge, he surely would not have waited more than a month before taking any action to effect the discharge.

In view of the foregoing, I do not credit Captain Ross' testimony that he suspended Mansfield on February 14, 1968, because he was convinced that Mansfield had feigned being seriously ill in order to attend the Board hearing at Paducah on February 7, and that in April he recommended Mansfield's discharge to General Manager Kirkpatrick because Mansfield had threatened to hit Sweet with a "toothpick." I find from Respondent's hostility to organization of its employees by the Union, its knowledge of Mansfield's Union activity, its threats to discharge Mansfield for this activity, its unconvincing explanations for the suspension and discharge of Mansfield, and its other unlawful conduct, that Respondent suspended Mansfield on February 14, and discharged him on April 9, 1968, to discourage its employees from supporting the Union, thereby violating Section 8(a)(3) and (1) of the Act.

IV. Conclusions of Law

1. Respondent Mid-South Towing Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

V. The Remedy

Having found that Respondent engaged in certain unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that Respondent suspended and discharged Alvin R. Mansfield in violation of Section 8(a)(3) and (1) of the Act. It will therefore be recommended that the Respondent offer him immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings suffered by reason of the discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned, absent the discrimination, from the date of the discrimination to the date of the offer of reinstatement, less net earnings during such period, with backpay computed on a quarterly basis in the manner established by the Board in **F. W. Woolworth Co.**, 90 NLRB 289. Backpay shall carry interest at the rate of 6 percent per annum as set forth in **Isis Plumbing & Heating Co.**, 138 NLRB 716. Further, it will be recommended that Respondent preserve and make available to the Board, upon request, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and useful to determine the amounts of backpay due and the rights of reinstatement under the terms of this recommendation.

VI. Recommended Order

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that:

Respondent Mid-South Towing Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively threatening employees concerning union activities; threatening employees with discharge or other economic reprisals because of their organizational activities; granting employees wage increases in order to discourage their support of a labor organization; telling employees that it would be futile to support a labor organization because Respondent would not recognize it as their bargaining representative; soliciting employees to withdraw from the Union; or in any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

(b) Discouraging membership in the Union, or in any other labor organization by suspending or discharging employees or in any other manner discriminating against them in regard to hire or tenure of employment or any term or condition of employment.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer Alvin R. Mansfield immediate and full reinstatement to his former or substantially equivalent position, without prejudice to seniority or other rights and privileges, and make him whole for any loss of earnings, in the manner set forth in "The Remedy" section of the Trial Examiner's Decision.

(b) Notify the above-named employee, if presently serving in the Armed Forces of the United States, of his

right to full reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(c) Preserve and make available to the Board or its agents all payroll and other records, as set forth in "The **Remedy**" section of the Trial Examiner's Decision.

(d) Post on its motor vessels, and all other places where notices to employees are customarily posted, copies of the notice attached hereto as "Appendix"[22]. Copies of said notice, on forms provided by the Regional Director for Region 9, shall, after being duly signed by Respondent, be posted immediately upon receipt thereof, in conspicuous places, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Trial Examiner's Decision and Recommended Order, what steps Respondent has taken to comply herewith.[23]

Dated at Washington, D. C.

Melvin Pollack
Trial Examiner

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[22] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

[23] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 9, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX C

29 U.S.C.

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

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29 U. S. C.

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

46 U. S. C.

§ 688. Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1505

MID-SOUTH TOWING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 436 F. 2d 393. The Board's decision and order (Pet. App. A5-A28) are reported at 177 NLRB No. 123.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1971. The petition for a writ of certiorari was filed on March 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the findings

of the National Labor Relations Board that the Company committed unfair labor practices by suspending and discharging an employee because of his union activities and engaging in other acts of coercion during a union representation campaign.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, as amended, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pages A29-A30 of the appendix to the petition.

STATEMENT

The Company, a river barge line, operates the motor vessels *Martha Lynn, Girlie Knight* and *Julia Woods* to transport freight on the Mississippi and Ohio rivers. In June or July 1967, the Marine Officers Association, Local 54, International Brotherhood of Teamsters, began an organizing campaign among the Company's employees (Pet. App. A7-A8).

1. *The Company's acts of restraint and coercion*

From the inception of the campaign, deckhand Alvin Mansfield solicited signed union pledge cards from his fellow crew members aboard the *Martha Lynn* (Pet. App. A8; R. 57).[1] In December 1967, the captain of the *Martha Lynn* told Mansfield that the Company had advised him to discharge "undesirable personnel," specifically including Mansfield, because he "was trying

[1] "R." references are to the joint appendix filed in the court below.

to organize the [Union] * * * on the Martha Lynn" (Pet. App. A8-A9; R. 62-64). Later on that month, deckhand Peter Oreskovich, who had also been soliciting employees for the Union, was told by Assistant Port Engineer John Snyder that his organizing efforts were "endangering" his job and were putting him in "bad standing with the Company" (Pet. App. A9; R. 105-106).

The following month, Port Captain Andy Ross came aboard the *Martha Lynn* and told Oreskovich that one of the employees had signed a statement accusing Oreskovich of threatening him with the loss of his job if he refused to sign a union card (Pet. App. A11; R. 107-108). Upon Oreskovich's denial of having made any such threat, Ross offered to give him the name of the complaining employee if Oreskovich would reveal the names of the crew members who had signed pledge cards and would also reveal what he knew about Mansfield and another employee. When Oreskovich refused, Ross told him that Company President Noble Gordon had stated that, "no union [was] going to organize this company ever, and they had just been feeding us a pack of lies and they couldn't benefit us at all" (*ibid*). Also during January, Snyder warned Mansfield to stop soliciting pledge cards because he "was skating on pretty thin ice with the company" (Pet. App. A10; R. 64-65).

In late January, after the Union had filed a representation petition with the Board and an election had been directed for March 15 (Pet. App. A8; R. 172-177), President Gordon gave a speech to the crew of the

Martha Lynn in which he stated that the Union consisted of "thugs, convicts, liars and scum of the earth," that it "had a long record of thievery and all kinds of scullduggery", that "[he] would not at any time let the [Union] * * * take an unfair advantage by coercive tactics by threats and intimidation, which is their stock in trade", and that "there wasn't any union going to organize this company" (Pet. App. A12-A15; R. 67, 108, 120-121, 123). Gordon also enumerated the benefits provided by the Company, stated that the Union was "only interested in power and money" and not in the employees' welfare, and warned that "the only weapon they had was to strike this company, and should that come about we would fulfill our obligations and responsibilities to customers and that meant running the boats" (Pet. App. A13-A14; R. 124-125). He discussed the Florida right-to-work law at length and stated that the Company would never agree to a union shop (Pet. App. A14; R. 125). Finally, Gordon claimed that the Company had been engaged in discussions with the Rivermen's Association and the employees "would have already had a raise if it hadn't been for certain people holding up negotiating the contract through the Rivermen's Association" (Pet. App. A13; R. 108-109). Gordon then turned to Mansfield and asked, "How about you, Mansfield, has anyone been telling you any lies?" (Pet. App. A13; R. 68, 109).

On February 1, 1968, the Company gave the employees a wage increase of one dollar per day (Pet. App. A15-A16; R. 68, 109). Subsequently, a statement

reading, "I withdraw my support from the [Union]" was circulated among the *Martha Lynn* crew (Pet. App. A16; R. 80-81, 110). Mansfield was told that he would not be fired if he signed. He refused to sign (Pet. App. A16; R. 80-81). Oreskovich, however, signed a copy of the statement, given to him by Snyder (Pet. App. A16; R. 110).

2. *The discharge of Mansfield*

On February 5, Mansfield was taken ashore, on his request, for treatment of possible appendicitis. The examining physician was unable to confirm the presence or absence of the ailment, but told Port Captain Ross that Mansfield could not go back to work and should be put in a hospital for a couple of days (Pet. App. A17-A18; R. 67-73, 145-146, 155). The physician then agreed to allow Mansfield to go home and see his personal doctor (Pet. App. A19; R. 73).

The next morning, Dr. Stephen Burkhart examined Mansfield, told him he had a prostate infection and was tender around his appendix, gave him medication, and asked him to return sometime the following day (Pet. App. A19; R. 75). Later that day, Captain Ross called Dr. Burkhart and was told of the diagnosis and treatment (Pet. App. A19, n. 13; R. 156).

The following day, February 8, Mansfield, feeling a little better, attended the Board hearing on the Union's representation petition (Pet. App. A19; R. 75). Although he did not have time to see the doctor that day, he saw him the following morning and was given a refill prescription and told to return on February 12,

which Mansfield did (Pet. App. A20; R. 180, 76). Thereafter, as Dr. Burkhart predicted, the infection subsided (Pet. App. A20; R. 76).

On February 8, Captain Ross, who had observed Mansfield at the Board hearing, called Dr. Burkhart and was told that Mansfield's appendix had cleared up, but that he still had "a slight problem with his prostate" and was taking medication (Pet. App. A20, n. 15; R. 156-157). Mansfield subsequently received a letter from Ross, dated February 14, advising him that he was being given a 30-day disciplinary suspension for misrepresenting his illness in order to attend the Board hearing (Pet. App. A20-A21; R. 181).

Although about a week later Ross told Mansfield that he could return to work when his suspension ended (Pet. App. A21; R. 78), Mansfield was permanently discharged about the date the suspension was scheduled to terminate. The letter of discharge reiterated the accusations leading to Mansfield's suspension and further alleged that Mansfield had "threatened to use physical violence against one of the mates when [he was] ordered to carry out some of [his] normal duties as a deckhand"[2] (Pet. App. A21-A22; A36-A37; R. 79, 182-183).

3. *The decisions below*

Upon the foregoing facts the Board, in agreement with the trial examiner, concluded that the Company

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[2] The incident mentioned in the letter had occurred from six months to a year before Mansfield's discharge (Pet. App. A22-A23; R. 81-83, 96).

had committed unfair labor practices in violation of Section 8(a)(1) of the Act by threatening employees Peter Oreskovich and Alvin Mansfield with discharge if they refused to cease their union organizing activities (Pet. App. A9-A10); by soliciting Oreskovich and Mansfield to withdraw their union membership (Pet. App. A16-A17); by interrogating Oreskovich about the union affiliations of other employees and warning him not to attend a Board hearing involving the Union (Pet. App. A12); by singling out and questioning Mansfield concerning union activities (Pet. App. A15); by telling its employees that they would have had a wage increase but for the Union (Pet. App. A14); by granting a wage increase shortly thereafter when the Union filed a representation petition (Pet. App. A16); and by indicating that support of the Union would be futile because the Company would never agree to recognize it (Pet. App. A15). The Board also agreed with the trial examiner that the Company had suspended and subsequently discharged Alvin Mansfield for engaging in union activity and had thereby violated Section 8(a)(3) and (1) of the Act (Pet. App. A25). The Board ordered the Company, *inter alia,* to reinstate Mansfield with backpay (Pet. App. A27).

The court of appeals, in a *per curiam* opinion, upheld the Board's decision and enforced its order (Pet. App. A1-A4).

ARGUMENT

The Company's basic contention that the Board's order requiring the reinstatement of Mansfield would

render its vessel unseaworthy rests on the premise that Mansfield was discharged for threatening another seaman. The court of appeals correctly concluded, however, that substantial evidence supported the Board's finding that Mansfield was discharged for union activity and not for physically threatening a fellow employee some six months to a year prior to the discharge. In any event, only an evidentiary issue is presented and further review is not warranted. See *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491.

The Company's additional contention that it was justified in engaging in the challenged conduct to counteract its supervisory personnel's pro-union activity is without merit. An employer can adequately protect himself against such activity without committing unfair labor practices. See *National Labor Relations Board* v. *Douglas County Electric Membership Corp.,* 358 F. 2d 125, 130-131 (C.A. 5).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1971.

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